U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 15 December 2004BALCA Case No.: 2004-INA-85

ETA Case No.: P2002-VA-03382957

In the Matter of:

McAREE CONSTRUCTION,
Employer,

on behalf of

FRANCISCO PONCE-AYALA,
Alien.

Appearance: Fredy Lopez, Agent
Manassas, Virginia
For the Employer and the Alien

Certifying Officer: Stephen W. Stefanko
Philadelphia, Pennsylvania

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer of an application for alien employment certification. Permanent alien employment certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and Title 20, Part 656 of the Code of Federal Regulations. We base our decision on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 18, 2001, McAree Construction ("the Employer") filed an application for labor certification to enable Francisco Ponce-Ayala ("the Alien") to fill the position of Carpenter. (AF 120). Fredy Lopez was listed on the ETA 750 as the Employer's agent.

On August 7, 2003, the CO issued a Notice of Findings, ("NOF"), proposing to deny certification. (AF 93). The CO found that the Employer failed to prove that the overall recruitment efforts were in good faith, given that the Employer had placed telephone calls to two U.S. applicants and when the calls failed to reach the applicants, made no further attempts to contact these applicants, either by certified mailing or other means. The CO asserted that an employer who does no more than place unanswered telephone calls without making additional attempts to contact the applicants has failed to make the minimally acceptable effort. The Employer was requested to show that the U.S. workers were not able, willing, qualified or available for the job opportunity at the time of initial referral.

By letter dated September 14, 2003, Fredy Lopez filed rebuttal on behalf of the Employer. (AF 37). Mr. Lopez argued that in other labor certification cases, unanswered telephone calls and/or means other than certified mailings had been accepted and approved in the past. Attached were documents from several other labor certification applications.

A Final Determination ("FD") was issued on December 29, 2003. (AF 30). The CO found that the Employer had failed to satisfactorily address the issue of whether U.S. applicants were rejected solely for lawful, job-related reasons, and the Employer failed to produce documentary evidence of good faith efforts to fill the position with a U.S. worker. The CO reiterated his position that when efforts to contact by telephone are unsuccessful, an employer has an obligation to try alternative means of contact in a genuine effort to contact seemingly qualified applicants. The CO stated that the rebuttal was entirely from Mr. Lopez; the CO noted that unverified or unsupported statements

made solely by an employer's counsel cannot be given evidentiary weight. Since none of the five previously approved applications which were submitted as part of the rebuttal were submitted by the petitioning Employer in this case, none of the statements submitted as rebuttal were supported by a person with first hand knowledge of the facts presented.

On February 2, 2004, the Employer filed a Request for Review. (AF 1). In its Request for Review, Mr. Lopez, on behalf of the Employer, reiterated the argument that other applications had been approved in cases where telephone calls were unsuccessfully placed to U.S. applicants and no certified mailings or other attempts to contact the applicants were made. Attached were documents from other labor certification applications.[1] This matter was docketed by the Board on February 23, 2004. The Employer did not file a brief.

DISCUSSION

The Employer's reliance on prior findings in other cases is misplaced, as this Board is not bound by those findings. *Tedmar's Oak Factory*, 1989-INA-62 (Feb. 26, 1990). Each labor certification application involves its own set of facts and issues and, therefore, "submission of another employer's approved application does not set any precedent to which the CO [or the Board] is bound." *Paralegal Priorities*, 1994-INA-117 (Feb. 1, 1995).

Mr. Lopez also requests that this Board "[accept] as valid my argument as the AGENT and not the employer's arguments," that this application should be certified, given the past pattern of accepting unsuccessful phone calls or even just the "no response statement" as acceptable evidence of minimally acceptable efforts of recruitment on the part of employers. Finally, Mr. Lopez cites 20 C.F.R. § 656.20 in support of the permissibility of accepting his argument as agent for the Employer.

[1] This Board will not consider material submitted with the request for review, as our review is to be based on the record upon which the denial of labor certification was made, the request for review and any statement of position or legal briefs. 20 C.F.R. §§ 656.27(c), 656.26(b)(4). Evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992).

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a "good faith" effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988); *Aquatec Water Systems*, 2000-INA-150 (Sept. 21, 2000). Actions by an employer which indicate a lack of good faith recruitment are grounds for denial. 20 C.F.R. §§ 656.1, 656.2(b). The employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). The employer must attempt to contact potentially qualified applicants as soon as possible after receiving job applicant referrals from the state job service. *Loma Linda Foods, Inc*., 1989-INA-289 (Nov. 26, 1991)(*en banc*).

Where an employer's efforts to reach an applicant by telephone are unsuccessful, a reasonable effort requires an alternative method of contact, such as mail. *Delmonico Hotel Co*., 1992-INA-324 (Jul. 20, 1993). Reasonable efforts to contact qualified U.S. applicants require more than a single type of attempted contact. *Diana Mock*, 1988-INA-255 (Apr. 9, 1990); *C'est Pzazzz Industries*, 1990-INA-260 (Dec. 5, 1991); *Any Phototype, Inc.*, 1990-INA-63 (May 22, 1991). In the instant case, the only type of contact alleged by the Employer was telephone calls. Where, as in this case, there is a small number of applicants, making unsuccessful phone calls is insufficient to establish good faith recruitment. *See Diana Mock, supra; American Gas & Service Center*, 1998-INA-79 (Jan. 12, 1999). The Employer did not attempt to contact the applicants by mail, despite its inability to reach them via telephone calls. The CO was correct in determining that this course of conduct was indicative of less than good faith recruitment. As such, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, D.C. 20001-8002

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typed pages. Upon the granting of a petition the Board may order briefs.